Filed 2/8/19 P. v. Fulgham CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. AARON FULGHAM, Defendant and Appellant.	C082580 (Super. Ct. No. 96F09069)

SYNOPSIS OF THE APPEAL

Petitioner, Aaron Fulgham, robbed and stabbed Jeff Stetka to death in 1996 when petitioner was 22 years old. Thereafter petitioner was convicted of first degree murder having robbery as a special circumstance, robbery, and use of a knife. (Pen. Code, §§ 211, 212.5, subd. (a), 187, 189, 190.2, subd. (a)(17)(A)), 12022, subd. (b); statutory section references that follow are to the Penal Code unless otherwise stated.) Petitioner

was sentenced to life in prison without the possibility of parole. In 2002, we affirmed his conviction on appeal. (*People v. Fulgham* (Mar. 15, 2002, C030529) nonpub. opn.].)

In 2016, petitioner, in propria persona, filed "motion[s] for reconsideration of sentence" arguing that judicial and legislative developments since his conviction have made life sentences without the possibility of parole in cases such as his "illegal."

The trial court denied his motions and he appeals. We appointed counsel to represent Fulgham in this appeal. We affirm the trial court's denial of his motions.

FACTS AND PROCEEDINGS

At the People's request, we take judicial notice of our record in Fulgham's appeal to this court from his conviction. (*Fulgham, supra,* C030529.)

In 1996, when Fulgham was 22 years old, he robbed and stabbed to death his victim, Jeff Stetka, after planning the crime with codefendant Rudy Murphy. In Superior Court case No. 96F09069, Fulgham was convicted of first degree murder with a robbery special circumstance, first degree robbery, and use of a knife. (*Fulgham, supra,* at slip opn. p. 1.)

In 1998, the trial court sentenced Fulgham to life in prison without the possibility of parole (LWOP) plus one year for the weapon enhancement, with the robbery sentence stayed under section 654. (*Fulgham, supra*, at slip opn. p. 1.)

Fulgham's sole contention in the prior appeal was that the trial court abused its discretion by removing a juror during deliberations. (*Fulgham, supra*, at slip opn. p. 2.)

We affirmed the judgment in March 2002. (*Fulgham, supra,* at slip opn. pp. 2, 16.)

On June 8, 2016, Fulgham as petitioner filed a Motion for Reconsideration of Sentence, arguing (incorrectly) that the United States Supreme Court declared in "Graham" (*Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825]), that it is "illegal" to sentence a juvenile to LWOP "due to the lack of mental capacity," and that the

California Legislature "through SB 261" (§ 3051 youth offender parole hearings, Stats. 2015, ch. 471) deemed juveniles to include youthful offenders under age 23. Fulgham asked the trial court to resentence him to a term of 25 years to life in prison, which he argued was compelled by the state and federal equal protection clauses (though *Graham* was a cruel/unusual punishment case).

The trial court, in an order dated June 27, 2016, dismissed the motion for lack of jurisdiction. The court first concluded it had no jurisdiction after Fulgham commenced serving his sentence (*People v. Karaman* (1992) 4 Cal.4th 335 (*Karaman*)), and the limited exceptions to that rule did not apply. Section 1170's provision for a petition for recall and resentencing after 15 years of incarceration did not apply to defendants, like Fulgham, who were 18 or older when they committed the crimes for which they received LWOP sentences. (§ 1170, subd. (d)(2).) And the sentence was not unlawful as a matter of law. (*People v. Welch* (1993) 5 Cal.4th 228.)

The trial court added it would not construe the motion as a petition for writ of habeas corpus, because Fulgham did not demonstrate entitlement to resentencing. He was 22 years old when he committed the crime, and the line of United States Supreme Court cases addressing sentencing of *minors* was inapplicable to him. (*Graham v. Florida, supra*, 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407] (*Miller*).) The California legislation "SB 261" authorizing parole hearings for youth offenders who were under age 23 (now 25) when they committed their crimes -- Penal Code section 3051, as amended by Senate Bill No. 261 (Stats. 2015, ch. 471) -- was inapplicable because section 3051 specifically excludes from its benefits persons sentenced to LWOP for crimes committed after age 18. And section 1170's provision for a petition for recall and resentencing after 15 years of incarceration applied only to defendants who were under age 18 when they committed the crime for which they were sentenced to LWOP. (§ 1170, subd. (d)(2).)

Meanwhile, Fulgham filed an "amended" motion for reconsideration, saying he meant to quote *Montgomery v. Louisiana* (2016) _U.S._ [193 L.Ed.2d 599] (*Montgomery*), rather than *Graham*, and again invoked the equal protection clause.

On July 29, 2016, the trial court issued another order declining reconsideration. The court observed that youthful offenders age 18 to 23 sentenced to LWOP are not similarly situated to youthful offenders age 18 to 23 sentenced to life with minimum terms that would be the functional equivalent of LWOP absent the benefit of section 3051. Persons sentenced to LWOP generally have committed first degree murder with at least one special circumstance, which would render an adult offender eligible for the death penalty. The electorate's adoption of the death penalty by initiative in 1978 reflected the view that special circumstance murder is more heinous than murder without special circumstances. As such, the electorate made a rational choice to impose a greater penalty for special circumstance murder. And the Legislature, in choosing not to extend the benefits of resentencing or parole hearing to special-circumstance murderers age 18 to 23 (now 25), did not violate equal protection.

On July 14, 2016, Fulgham filed a notice of appeal from the first postjudgment order. We will construe the notice as an appeal from both orders.

DISCUSSION

I

Jurisdiction

A trial court generally loses jurisdiction over a criminal case once the defendant has been ordered committed to the custody of the Department of Corrections and Rehabilitation, thereby commencing execution of sentence. (*Karaman*, *supra*, 4 Cal.4th 335.)

While not directly addressing jurisdiction in his opening brief, Fulgham in his "STATEMENT OF APPEALABILITY" invokes the rule that a court may at any time

correct a sentence that is unauthorized as a matter of law. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Serrato* (1973) 9 Cal.3d 753, 763, overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205 [an unauthorized sentence is one which could not lawfully be imposed under any circumstance in the particular case]; *People v. Cowan* (1987) 194 Cal.App.3d 756, 759-760; but see, *People v. Picklesimer* (2010) 48 Cal.4th 330, 338 [sex offender registrant seeking relief on equal protection grounds may not proceed by freestanding postjudgment motion for relief, but must file petition for writ of habeas corpus]; *In re Cook* (2017) 7 Cal.App.5th 393, 399-400 [availability of habeas corpus relief when changes in law expand rights and have retroactive effect], review granted Apr. 12, 2017, S240153 [to review question whether habeas jurisdiction exists for 17-year-old offender seeking post-sentencing hearing to make record of youth-related factors for eventual parole hearing].)

Regardless of whether Fulgham could proceed by postjudgment motion or should have proceeded by habeas corpus petition, we apply de novo review to the question of law whether his sentence is unauthorized (*People v. Antolin* (2017) 9 Cal.App.5th 1176, 1179-1180) and conclude his sentence is not unauthorized as a matter of law.

II

Cruel and/or Unusual Punishment

Fulgham argues his LWOP sentence was imposed as a mandatory minimum sentence, which as a matter of law is no longer authorized in light of subsequent United States Supreme Court cases holding that the constitutional prohibition against cruel and unusual punishment (U.S. Const., 8th Amend.) requires individualized consideration of factors bearing on immaturity of the offender before imposing LWOP sentencing. However, those cases apply only to minors under age 18, not to young adults like Fulgham who commit special circumstance murder at age 22.

Thus, *Miller*, *supra*, 567 U.S. 460, held that the Eighth Amendment to the federal Constitution prohibits *mandatory* imposition of LWOP on a *juvenile*. Mandatory LWOP for a juvenile precludes consideration of his chronological age and its hallmark features, including immaturity and failure to appreciate consequences, as well as other circumstances of incompetency associated with youth. (*Id*. at pp. 477-478.) LWOP may be appropriate for juveniles whose crimes reflects irreparable corruption, but a court may impose LWOP on a juvenile only after consideration of mitigating circumstances of youth. (*Id*. at pp. 479-480.)

Montgomery, *supra*, _ U.S. _ [193 L.Ed.2d 599] held that *Miller*'s holding constituted a new substantive constitutional rule that applies retroactively in a state court collateral challenge to the lawfulness of a prisoner's commitment. (*Montgomery*, at pp. 621-622.)

The United States Supreme Court cases establish that "children are constitutionally different from adults for purposes of sentencing." (*Miller, supra,* 567 U.S. at p. 471; *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1375.)

Fulgham notes California has its own constitutional prohibition against "cruel or unusual punishment" (Cal. Const., art. I, § 17), but he offers no California authority treating 22-year-old special circumstance murderers as children.

In *People v. Argeta* (2012) 210 Cal.App.4th 1478, an 18-year-old was sentenced to 100 years to life in prison for murder and five counts of attempted murder. The defendant argued his sentence was categorically cruel and/or unusual and, because he committed the crimes only five months after his 18th birthday, the rationale applicable to sentencing of minors should apply to him. (*Id*. at p. 1482.) The appellate court disagreed: "These arguments regarding sentencing have been made in the past, and while '[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [it] is the point where society draws the line for many purposes

between childhood and adulthood.' (*Roper v. Simmons*[, *supra,*] 543 U.S. [at p. 554]; see *Graham, supra*, 560 U.S at p. [51].) Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude Argeta's sentence is not cruel and/or unusual under *Graham, Miller, or[People v.] Caballero* [(2012) 55 Cal.4th 262 [cruel and unusual to sentence juvenile to functional equivalent of LWOP for nonhomicide offense without opportunity to demonstrate rehabilitation, later superseded by enactment of § 3051]]." (*Argeta,* at p. 1482.)

Fulgham argues *Argeta* is inapposite, because the argument there was that the sentence was *categorically* cruel and/or unusual, whereas here Fulgham is *seeking* a discretionary individual determination. Although defendant was not a juvenile when he committed his offenses at age 22, he argues he was entitled to relief because the California Legislature, in response to *Miller* and its progeny, enacted a statute providing a "youth offender parole hearing" to most prisoners who committed their offenses when they were "25 years of age or younger." (§ 3051, subd. (a).) Fulgham argues the California Legislature, by affording parole hearings to youthful offenders under age 23 (now amended to age 25) in section 3051, has deemed all persons under age 23 (now 25) to be "juveniles" -- either by creating a new youthful-offender class for *Miller* purposes or extending the *Miller* juvenile class to age 25. However, Fulgham cites no supporting authority for such a proposition, and the law is to the contrary.

As originally enacted, section 3051 afforded a youth offender parole hearing to persons who were under age 18 when they committed the offense, *but not if they were sentenced to LWOP*. (Former § 3051, subd. (h) ["This section shall not apply to cases . . .

in which an individual was sentenced to life in prison without the possibility of parole"], as enacted by Stats. 2013, ch. 312, § 4 (Sen. Bill No. 260).)

In 2015, the Legislature amended section 3051 to authorize a youth offender parole hearing to persons who were under age 23 when they committed their offense, in recognition of scientific evidence showing that certain areas of the brain, particularly those affecting judgment and decision-making, do not fully develop until the early-to mid-20s. (Former § 3051, Stats. 2015, ch. 471, § 1 (Sen. Bill No. 261); Sen. Rules Committee, Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) p. 3.) However, the 2015 amendment retained the exclusion for persons with LWOP sentences. (§ 3051, subd. (h); Stats. 2015, ch. 471, § 1.)

In 2017, the Legislature amended section 3051 to increase the age from 23 to 25, and to allow parole hearings for *minors* sentenced to LWOP, but not for persons over age 18 with LWOP sentences. (Stats. 2017, ch. 684, § 1.5 (Sen. Bill No. 394).)

Thus, section 3051, subdivision (h), states, "*This section shall not apply* to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or *to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age*. . . ." (§ 3051, subd. (h), italics added, as amended by Stats. 2017, ch. 684, § 1.5 (Sen. Bill No. 394).)

The legislative history of section 3051 shows the Legislature's distinction was deliberate: "California law permits *youth under the age of 18* to be sentenced to [LWOP]. The US is the only country in the world to use this sentence for *children*. In *Miller v. Alabama* (2012), the U.S. Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of [LWOP] for *juvenile* offenders. The Court held that sentencing courts are required to consider the constitutional differences between *children* and adults at sentencing. . . ." (Sen. Rules Committee, Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 394

(2017-2018 Reg. Sess.), Aug. 31, 2017, pp. 3-4, italics added.) The legislature history also shows the bill "[c]larifies that it does not apply to those with a [LWOP] sentence who were older than 18 at the time of his or her controlling offense." (*Id*. at p. 3; see also, Assem. Com. on Public Safety, Analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.), as amended May 26, 2017, pp. 1-3.)

Section 1170, subdivision (d), allows a person sentenced to LWOP to petition for recall and resentencing after 15 years of incarceration, but only if the person was under 18 years of age when he committed the crime. (§ 1170, subd. (d)(2)(A)(i) ["When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing"].)

We conclude Fulgham fails to show grounds for relief based on a claim of cruel and/or unusual punishment. Insofar as defendant challenges the statutory cut-off at age 18, we reject his equal protection argument, *post*.

III

Equal Protection

Fulgham contends that equal protection principles (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) requires that young adult murderers between ages and 18 and 25 with LWOP sentences must receive the Eighth Amendment protections set forth in *Miller* and *Montgomery*. We disagree.

The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; *In re Eric J.* (1979) 25 Cal.3d 522, 530.) "[A]n equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two

groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) The inquiry is not whether groups are similarly situated for all purposes, but whether they are similarly situated with respect to the legitimate purpose of the particular law challenged. (*Cooley, supra*, 29 Cal.4th at p. 253.)

Young adults and minors who commit special circumstance murder are treated differently. Special circumstance murder triggers LWOP sentencing (§ 190.2), but the court has discretion to substitute a sentence of 25 years to life for minors between the ages of 16 and 18 (§ 190.5). Section 3051 treats differently minors sentenced to LWOP for special circumstance murder and young adults (like 22-year-old Fulgham) sentenced to LWOP for special circumstance murder. Minors can receive an eventual parole hearing, while young adults cannot. (§ 3051, subds. (b)(4), (h).)

Fulgham urges strict scrutiny on that ground that personal liberty is at stake. He cites *People v. Olivas* (1976) 17 Cal.3d 236, 242-243, which applied strict scrutiny to a case challenging the trial court's discretion to commit a defendant aged 16 to 21, convicted in adult court, to the California Youth Authority for a term longer than if he were sentenced as an adult. However, the Supreme Court later explained that *Olivas* was a narrow holding for the limited proposition that boundaries between the juvenile court and adult criminal court systems should be rigorously maintained. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) As to sentencing generally, the rational basis standard applied, because the decision of how long punishment should be is properly left to the Legislature. (*Ibid*.)

Distinctions between juveniles and young adults for purposes of sentencing or parole hearings that may shorten sentences do not violate equal protection, despite the possibility that some juvenile characteristics may persist in young adults. (See, e.g., *Miller, supra*, 567 U.S. at p. 481 ["We have by now held on multiple occasions that a

sentencing rule permissible for adults may not be so for children"]; *People v. Gamache* (2010) 48 Cal.4th 347, 405 (*Gamache*) ["We previously have rejected the argument that a death penalty scheme that treats differently those who are 18 years of age and older, and those younger than 18, violates equal protection"].)

Even in the context of the more onerous death penalty, the California Supreme Court, citing United States Supreme Court authority, re-affirmed its conclusion that equal protection is not violated by a death penalty scheme that treats differently those who are 18 years of age and older, and those younger than 18. (*People v. Powell* (2018) 6 Cal.5th 136, 191, citing *Gamache, supra,* 48 Cal.4th at p. 405.) "Indeed, the United States Supreme Court has concluded the federal Constitution draws precisely this line, prohibiting the death penalty for those younger than 18 years of age, but not for those 18 years of age and older." (*Gamache, supra*, 48 Cal.4th at p. 405, citing *Roper, supra,* 543 U.S. at p. 574.) "In adopting a categorical rule, *Roper* expressly acknowledged that 'the qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.' [Citation to *Roper*.] . . . [¶] *Roper* teaches that a death judgment against an adult is not unconstitutional merely because that person may share certain qualities with some juveniles." (*Powell, supra*, 6 Cal.5th at pp. 191-192.)

Fulgham argues he was denied equal protection, because section 3051 excludes him from the benefits it extends to "other youthful offenders," i.e., he was similarly situated with "juveniles who committed their offenses before the age of 23," notwithstanding the existence of a child-juvenile class of offender (i.e., individuals who committed their crimes before age 18).

However, as indicated, the legislative history of section 3051 shows the Legislature's reason for the distinction: "California law permits *youth under the age of*

18 to be sentenced to [LWOP]. The US is the only country in the world to use this sentence for *children*. In *Miller v. Alabama* (2012), the U.S. Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of [LWOP] for *juvenile* offenders. The Court held that sentencing courts are required to consider the constitutional differences between *children* and adults at sentencing. . . ." (Sen. Rules Committee, Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.), Aug. 31, 2017, pp. 3-4, italics added.) The legislature history also shows the bill "[c]larifies that it does not apply to those with a [LWOP] sentence who were older than 18 at the time of his or her controlling offense." (*Id*. at p. 3; see also, Assem. Com. on Public Safety, Analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.), as amended May 26, 2017, pp. 1-3.)

We thus reject Fulgham's contention that equal protection requires availability of a youth offender parole hearing for a special-circumstance murderer over the age of 18 who was sentenced to LWOP.

If Fulgham means to suggest that young adult murderers sentenced to LWOP are similarly situated to young adult murderers with lesser sentences, we disagree. Persons convicted of different crimes are not similarly situated for equal protection purposes. (*People v. Jacobs* (1984) 157 Cal.App.3d 797, 803.) LWOP sentences are imposed for the more serious crime of special circumstance murder (§ 190.2), and the court cannot strike or dismiss a special circumstance found by a jury (§ 1385.1). The purpose of the special circumstance is to attempt to deter escalation of serious felonies into murder by making eligible for more severe punishment those defendants who escalate a serious felony into a murder. (*People v. Horning* (2004) 34 Cal.4th 871, 907.)

We conclude Fulgham fails to show grounds for relief on equal protection principles.

DISPOSITION

The orders denying reconsideration of sentence are affirmed.

HULL, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.